



In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-447

MATTHEW WILLIAMS, JR., *Petitioner*
v.
UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

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September, 1979

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**PETITION FOR A WRIT OF CERTIORARI
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The petitioner, Matthew Williams, Jr., prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals, Tenth Circuit, entered in this proceeding on July 17, 1979.

OPINION BELOW

The opinion of the Court of Appeals in this case, as yet unreported, appears as Appendix A hereto, *infra*. No opinions were issued by the trial court.

JURISDICTION

The opinion of the Tenth Circuit Court was entered July 17, 1979; the petitioner's timely Petition for Rehearing was denied on August 20, 1979. This Petition for Certiorari was timely filed within thirty (30) days from the date of the denial of rehearing aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The petitioner, Matthew Williams, was convicted of bank robbery. 18 U.S.C. §2113. The questions presented for review are:

1. Whether purported identifications by savings and loan employees were properly received into evidence where:

(a) The identifications were the product of an impermissibly suggestive confrontation at a pre-trial hearing where the employees were allowed to observe the charged defendant, Matthew Williams, for the duration of their testimony, and to make later identifications based on those observations, where none of the employees had an independent ability to recollect the appearance of the perpetrator of the robbery.

(b) The witnesses were permitted to "preview" the appearance and location of the accused in the courtroom through their being allowed to look through a back window of the courtroom during the course of trial, prior to their testimony.

2. Whether an affidavit insufficient under *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 4 L.Ed.2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 639 (1969), and their progeny, can support issuance of a search warrant for residential premises.

3. Whether hearsay information lacking corroboration or any other indicia of reliability can support issuance of valid search warrant for residential premises.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers and effects against unrea-

sonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

On January 26, 1977, a savings and loan was robbed by a lone individual who, brandishing a firearm, obtained \$10,878.91 in cash and \$42,000.00 in travelers checks from the employees. The robber was described as being a slender black male in his mid-twenties.

The day after the robbery, three individuals, Benjamin Moreno, Richard Moreno, and Lucius West, were arrested in Las Vegas in possession of travelers checks taken in the robbery. These individuals were not charged with the robbery, however. Rather, the petitioner herein became the focus of the investigation through hearsay information received. A photographic array "lineup" was prepared, which included a photograph of the petitioner; although it was shown to five or six employees, only one selected petitioner's photograph, she indicating that he was merely "the one that most closely resembled the robber." This "identification" took place March 8, 1977.

On March 14, investigating agents procured and executed a warrant for the search of residential premises located in Denver. The warrant was issued on the basis of an affidavit bearing hearsay information supposedly related by purported informants without sufficient corroboration or indicia of reliability. Although no physical evidence was seized connecting the petitioner to the robbery, the petitioner's three young stepchildren were claimed by the

agents to have made identifications of their stepfather, the petitioner, as being the man depicted in surveillance photographs taken during the robbery. The agents denied threatening or coercing these purported identifications, although at least one agent conceded that it was "possible" that one of the half dozen or so agents who executed the search "showed" the children a firearm during the course of the search.

Petitioner was finally arrested on October 11, 1977. He challenged the admissibility of the claimed identifications by the stepchildren, and the admissibility of in-court identifications by any of the employees of the savings and loan. On the date set for hearing the motions, two of the employees were permitted to simply enter the courtroom and assume seats in the spectator's section, which gave them an unobstructed view of the defendant in the courtroom context. These contacts occurred prior to any opportunity on the part of the defense to request sequestration, but despite the intimate contact at that hearing, neither witness involved identified the defendant as being the perpetrator of the robbery during the hearing.

The defense later filed a Motion to Suppress the identification of those two witnesses based on the confrontation at the pre-trial hearing. During the examination of the witnesses on the issues raised, however, the Court prevented defense counsel from inquiring concerning the details of the witness' recollection of the bank robbery, restricting examination only to the issue of "undue suggestion". Both witnesses were permitted to testify, despite the confrontation, and despite witness Fall's statement to the effect that she "might" be able to recognize the robber on height, that the perpetrator was "possibly" a Negro male, and that he "possibly" had a moustache.

The other witness, Judy Jamieson, who was the only witness who picked the photograph out of the photographic

array, could not, even with the pre-trial confrontations, identify Williams as the perpetrator until a subsequent time after her memory was "refreshed" after the hearing by her being given a surveillance photograph to compare to the appearance of Williams as he sat in the courtroom. The defense's efforts to call the investigating agents involved to testify in order to demonstrate the lack of independent basis for in-court identification were denied, the Court not permitting the calling of any witnesses on these issues.

As a result, both of these two witnesses were permitted to make purported identifications of the petitioner, in front of the jury, as being the robber. The identifications were permitted despite serious discrepancies in the descriptions supplied by the witnesses. The witnesses did agree, however, that the robber was in his mid-twenties.

The petitioner, Matthew Williams, testified, and denied involvement in the robbery. He was unable to set forth an alibi because of the long time between the date of the alleged offense and his arrest. He also testified, and the record reflected, that he was forty-two years old.

The jury returned a verdict of conviction. Post-trial evidentiary hearings concerning witness collaboration revealed through uncontradicted testimony that the witnesses who were not testifying at any particular moment were permitted to observe the defendant in the courtroom context through a back window in the courtroom doors, even prior to their being called to the stand. Thus, the witnesses were aware of the appearance of the charged person, the petitioner, and his exact location in the courtroom prior to their testifying. Certain of the witnesses also testified that, contrary to court orders, the witnesses had discussed their testimony, and identifications they had made of the accused during their testimony, after they had returned to the witness room area.

There was no physical evidence linking the petitioner to the robbery; only the purported identification testimony of the savings and loan employees implicated him in the crime. He was sentenced to twenty-five years' imprisonment.

On appeal, the United States Court of Appeals for the Tenth Circuit affirmed. Affirmance was based on holdings that the affidavit upon which the search warrant issued was sufficient despite its patent lack of corroboration or reliability, and that the in-court identifications were admissible despite the suggestive confrontations, the absence of independent recollection, and the trial court's failure to permit the calling of witnesses for the elicitation of testimony concerning the independent ability of the employees to attempt identification. Not discussed in the opinion was the fact that the sequestered prosecution witnesses were allowed to look through the windows in the courtroom door for a "preview" of the accused.

REASONS FOR GRANTING THE WRIT

I. THE IDENTIFICATIONS MADE BY THE SAVINGS AND LOAN EMPLOYEES WERE TAINTED BY UNNECESSARILY SUGGESTIVE PRE-TESTIMONIAL IDENTIFICATION PROCEDURES WHICH GAVE RISE TO A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION.

The petitioner, Matthew Williams, Jr., a man in his forties, was convicted of a robbery committed by a gunman who was described by all witnesses as being in his twenties. No physical evidence implicated Williams; indeed, travelers checks taken in the robbery were recovered from three other men in Las Vegas the day afterwards. Williams' conviction rested solely on purported identifications made by the employees of the savings and loan. Those identifications

were the product of unreasonably suggestive pre-trial confrontations, and thus, should not have been admitted into evidence.

Of the five or six employees who were shown the photographic lineup, only one picked the defendant's picture, and she only as that which "most closely resembled the robber"; she "would choose [Williams' photograph] if I was going to choose one of the gentlemen as being the robber."

Judging from the witnesses' contemporaneous descriptions, the likelihood of reliable later identification was negligible. Witness Fall stated she did not believe she would recognize the robber if she saw him again, that he was "possibly" a "Negro male" as to whom she did not "get a very good look".

Witness Jamieson admitted to not having an independent recollection of the perpetrator, and had to be "refreshed" even after viewing Williams at close range during the first suppression hearing, by comparing surveillance photographs to him. The various witnesses could not agree even as to the type of hat, or stocking mask worn, and no specifics were given as the robber's features. All agreed, however, that he was in his twenties.

Yet despite the absence of indicia of independent recollection, and despite the occurrence of a highly suggestive confrontation at a pre-trial hearing, the trial court permitted all of the witnesses called to attempt eye-witness identifications of Williams as the bank robber. And, in determining the admissibility of the testimony, over defense objections, the trial court did not permit the defense to inquire as to the very factors pertinent to the admissibility of their testimony, such as the specific features of the robber, the witnesses' opportunity to observe the robber, dis-

crepancies between pre-confrontations descriptions and the actual physical characteristics of the defendant, and the level of uncertainty demonstrated at the confrontation. See, e.g., *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

Indeed, what testimony there was on these issues revealed that Jamieson viewed the robber for perhaps as short a period of time as five seconds, and that even after the confrontation in Court, where she sat perusing the petitioner throughout her testimony concerning the photographic identification procedures, she had no independent recollection of the bank robber, and could only later attempt an identification based on comparison with surveillance photographs. Not surprisingly she was not asked to attempt identification at the initial suppression hearing, which dealt with the photographic array.

Defense inquiries to witness Fall were similarly circumscribed. And, when Fall denied a number of pre-confrontation statements she made as to her inability to identify the robber, defense attempts to call the investigating agents to demonstrate the lack of independent basis were precluded, thereby hindering the defense from developing the very factors relevant to the court's determination. This was reversible error, as was admission into evidence of the testimony of the two witnesses tainted by the pre-testimony courtroom confrontation.

As was recently stated by this Honorable Court in *Manson v. Brathwaite*, ___ U.S. ___, 97 S. Ct. ___, 53 L.Ed.2d 140 (1977): "reliability is the linch pin" of admissibility of identification testimony tainted by prior confrontations. "The standard, after all, is that of fairness as required by the due process clause of the Fourteenth Amendment."

Here, witnesses who were permitted to enter into and remain in the courtroom unbeknownst to defendant and defense counsel were allowed to view the petitioner from the spectator's section and from the witness stand under unquestionably suggestive circumstances. In the hearing that followed, no attempt was made by the prosecution to elicit any in-court identification testimony from them. In other words, they were permitted simply to view the defendant without being probed as to possible identifications, and only later claimed that they then recognized Williams to be the bank robber.

Any pre-trial confrontation must be carefully scrutinized as to its fairness. *United States ex rel. Ragazzini v. Brierly*, 321 F.Supp. 440 (W.D. Penn. 1970). In fact, that the confrontation occurred in a courtroom enhances the likelihood that future identification was the result of the confrontation rather than of independent recollection. *Sanchell v. Parrett*, 530 F.2d 286 (8th Cir. 1976). The error in admitting identification testimony was not restricted, however, to the two witnesses whose testimony was tainted by the prior courtroom confrontation. Unrebutted testimony at post-trial hearings revealed that the other witnesses were permitted to watch the ongoing courtroom proceedings, prior to testifying, through a small window at the back of the courtroom, from where they could view the petitioner's appearance and his exact location in the courtroom prior to their being called to testify.

This incredible set of circumstances, where witnesses to a robbery which had occurred a year earlier were permitted to get an "advance showing" of the accused prior to attempted identification, was not even mentioned by the Tenth Circuit in its opinion affirming the conviction thereafter returned. The petitioner's conviction rested solely on the claimed identifications made by the employ-

ees of the savings and loan, and the facts adduced at hearings and at trial established that those identifications were the product of procedures which denied the petitioner due process. Petitioner was sentenced to twenty-five years' imprisonment on the basis of eye-witness testimony alone; his right to due process mandates that his innocence or guilt be given fair trial, which it has not yet received.

II. THE AFFIDAVIT UPON WHICH THE SEARCH WARRANT ISSUED WAS CONSTITUTIONALLY INADEQUATE THROUGH ITS FAILURE TO PRESENT THE ISSUING MAGISTRATE WITH FACTS INDICATING PROBABLE CAUSE.

A home believed to be Williams' residence was subjected to a four hour or longer search by at least six investigating agents. The search began in the afternoon, when only Williams' eight year old stepson was at home, but later the remaining two children returned, followed by their mother. No physical evidence relating to the robbery was uncovered in the search, which took place approximately a month and a half after the robbery, but what was acquired were supposedly "immediate" identifications of petitioner from a photograph isolated from surveillance photographs taken during the robbery.

The two children denied making the identifications, but prosecution witnesses were nevertheless permitted to testify concerning the alleged identifications made.

The petitioner does not here contest the trial court's ruling that the purported identifications were not the result of coercion or intimidation, as this was a factual determination resolved by the trial court on contested evidence. There can be no question, however, but that the supposed identifications were the fruit and consequence of

the search. Clearly, if the search was unlawful, then any identifications made during the search were inadmissible as the fruits thereof. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The pertinent averments of the affidavit were as follows:

"Based on an investigation by Special Agent Brian W. Jovick hereafter referred to as your affiant. On 1/26/77, Kathleen F. Wray, teller, Midland Federal Savings and Loan, 6700 E. Colfax, advised SA Donald E. VanPelt who in turn advised your affiant that on 1/26/77 Midland Federal Savings and Loan, 6700 E. Colfax, Denver, Colorado, was robbed by an armed Negro male who wore a nylon stocking over his head and face as well as a hat. Your affiant has reviewed transcribed interviews of witnesses conducted by FBI agents and determined the robber was wearing the following described clothes: beige or tan colored hat with brim, blue hip-length jacket, blue-jeans, carrying dark blue or black handgun. Also on 1/26/77, Blanche Fall advised your affiant that currency, including bait money, was taken in the robbery, as was \$7,000.00 worth of \$10.00 denomination Barclay Traveler's Cheques, Serial Numbers 111857701 through and including 11858400 and \$35,000 worth of \$50.00 denomination Barclay Traveler's Cheques, Serial Numbers 511417401 through and including 411418100. Also on 1/26/77, SA James E. Huggins advised your affiant that he caused to be developed the film taken from the camera which was activated during the robbery of Midland Federal Savings and Loan, 6700 E. Colfax Avenue, Denver, Colorado, and thereafter obtained photographs of the robber. Your affiant has observed these photographs and states that the robber was wearing a

stocking on his face and a hat which your affiant describes as a light colored fishing or golfing-type cap with full brim and different colored band.

"On 1/26/77, Christie Hanschild advised your affiant that Midland Federal Savings and Loan, 6700 E. Colfax, Denver, Colorado, was insured by the Federal Savings and Loan Insurance Corporation.

"On 1/27/77, SA Thomas J. Fay, Las Vegas FBI, advised your affiant that Benjamin Moreno, Richard Conception Moreno and Lucius John West, all Spanish Americans, were arrested by Las Vegas Metropolitan Police Department in possession of a number of the above described Barclay Traveler's Cheques.

"On 3/4/77, Denver Police Department Officer Dave Michaud advised your affiant that a confidential source, who has previously proven reliable, told him that Matthew Williams, Jr., was an associate of the Morenos and West. Michaud further advised your affiant that Williams had previously been arrested by the Denver Police Department for Aggravated Robbery.

"SA James E. Huggins advised your affiant that on 12/9/77, Donna Weaver, teller, Capital Federal Savings and Loan, 125 Adams Street, Denver, Colorado, advised that a Negro male, wearing a hat, entered Capital Federal Savings and Loan, 125 Adams and acted suspicious. SA Huggins further advised your affiant that Weaver told him she activated the surveillance camera and observed the Negro male leave Capital Federal Savings and Loan and enter a dark Oldsmobile, 1976 Colorado License BJ 7305. SA Huggins also advised your affiant that according to the com-

puterized records of the Colorado Department of Revenue, Motor Vehicle Division, 1976 License BJ 7305, registers to Matthew Williams for a 1970 Oldsmobile. SA Huggins further advised your affiant that he caused to be developed the film taken from the surveillance camera at Capital Federal Savings and Loan on 12/9/77 and obtained photographs of the Negro male who entered that institution and acted suspicious.

"On 3/14/77, your affiant compared the surveillance photograph taken by the bank camera during the robbery of Midland Federal Savings and Loan on 1/26/77 with the photograph taken by the bank camera of the suspicious individual in Capital Federal Savings and Loan on 12/9/77, and determined that the hat worn by the individual in the Midland photograph appears to be identical to the hat worn by the individual in the Capital Federal Savings and Loan photograph.

"On 3/14/77, Denver Police Department Officer, Dave Michaud advised your affiant that he had shown the photographs taken during the robbery of Midland Federal Savings and Loan on 1/26/77 to a confidential source who, after viewing the photograph, advised the photo appeared to be that of Matthew Williams. Michaud further advised your affiant that the confidential source also advised that he has previously seen Williams wearing a hat which the source believed was identical to the one worn by the robber in the Midland photographs. Your affiant was further advised by Michaud that the source stated that the hat was currently located at 1603 East 17th Avenue, and that he had viewed the hat there within the last four days.

"Finally, Michaud advised your affiant that the confidential source is personally acquainted with Matthew Williams. Michaud advised your affiant that the confidential source advised him Matthew Williams resides with a girl named Carolyn. Michaud further advised your affiant that he contacted Delores Finger Rosenberg Realty, who has control over the premises at 1603 East 17th Avenue, and that Finger advised that Carolyn Williams resides at 1603 East 17th Avenue. Michaud also advised your affiant that Finger identified a photograph of Matthew Williams as being identical to the individual who pays the rent for 1603 East 17th Avenue. Finally, Michaud advised your affiant that the confidential source also observed an automatic-type handgun at 1603 East 17th Avenue within the last four days."

The issue presented is the constitutional adequacy of a warrant issued upon the supposed statements of the "hauntingly familiar" confidential informant. *United States ex rel. Metze v. State*, 303 F.Supp. 1359 (S.D.N.Y. 1969). The problem posed by the use of confidential informants, whether mythical or corporeal, is that of hearsay, and the constitutional parameters governing the extent to which hearsay can support a lawful determination of probable cause for an investigatory intrusion. In order to pass constitutional muster, a "substantial basis" is required to be shown for crediting hearsay information within affidavits for search warrants. *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697 (1960).

The seminal decisions governing the constitutional sufficiency of affidavits for search warrants are *Aguilar* and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 639 (1969). In *Aguilar*, this Honorable Court

dealt with the problem of confidential informants in the search warrant context, elucidating a "two-pronged" test of constitutional adequacy: the affiant must state personal knowledge of all matters contained in the affidavit, or if hearsay statements supposedly attributed to confidential informants therein appear, the averments must suffice to inform the issuing magistrate of the underlying circumstances from which the unsworn declarant reached the conclusions drawn concerning the location of items or the commission of crime, together with the underlying circumstances from which the affiant concluded that the informant was credible or the information received reliable.

This analysis was fashioned in order to guarantee that officials responsible for the issuance of search warrants adequately perform their "neutral and detached function" as arbiters of probable cause, rather than merely being "rubber stamps" placing the imprimatur of legality on a determination of probable cause made by an "officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948). See also *Spinelli v. United States*, *supra*.

In *Spinelli*, this Court further expounded on the *Aguilar* formulation. There, this Court held that, even absent satisfactory averments as to credibility or reliability, probable cause could be found where the underlying circumstances themselves were of such a character as to enable an independent evaluation of the validity of the informant's credibility and reliability. In the final analysis, what this comes down to, in the search warrant context, is whether there was probable cause to believe that the sought items "were where [the informant] said they were." *Spinelli v. United States*, *supra*. Here, petitioner urges that the affidavit on which the warrant issued did not establish probable cause.

The affidavit in the present case contains three separate paragraphs of information purportedly provided police officer Michaud from one or possibly two "confidential sources." The first such revelation was that a "confidential source" "previously proven reliable" advised the officer that Williams was an "associate" of the three men arrested in Las Vegas in possession of travelers checks taken in the robbery. The insufficiency of this claimed information is patent.

First, merely stating that the informant was "reliable," or "previously reliable," or "prudent" is an insufficient showing of informant credibility and reliability. *See, e.g., Spinelli v. United States, supra; United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed. 723 (1971). If recitals of reliability are to satisfy the second "prong" of the *Aguilar-Spinelli* formulation, those statements must, at a bare minimum, indicate through the sworn affidavit that the informant supplied information which led to convictions, or, at the very least, to arrests. *See McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 725, 4 L.Ed.2d 697 (1960); *United States ex rel. Rogers v. Warden*, 381 F.2d 209 (2d Cir. 1967). Uniformly the courts have required averments of some detail concerning the nature and consequences of prior tips in order that the issuing tribunal be supplied with at least some assurance that the "informant" actually exists. *See, e.g., United States v. Ross*, 424 F.2d 1016 (2d Cir. 1970); *United States v. Hood*, 432 F.2d 737 (7th Cir. 1969), *cert. denied*, 400 U.S. 820, 91 S.Ct. 38, 27 L.Ed.2d 48. The conclusory statement that an informant is or was "reliable" is totally inadequate to enable the independent and detached consideration of probable cause mandated by our Constitution.

Further, even the "factual" allegation claimed to have been related to Officer Michaud fails to satisfy the *Aguilar-Spinelli* requisites, for there is absolutely no indication

whatsoever of the informant's basis for his conclusion that Williams was an "associate" of Benjamin and Richard Moreno and Lucius West. Just as the "flat statement that Spinelli was 'known' to the FBI and others as a gambler was nothing more than a "simple assertion of police suspicion, which is not itself a sufficient basis for a magistrate's finding of probable cause," here the hearsay assertion concerning Williams' alleged association with other persons is no more than a straightforward allegation of informant speculation. There being no recitation of the underlying circumstances demonstrating the basis of confidential informant's information in this regard, the statement concerning alleged association is fatally deficient in the constitutional sense.

The second set of statements attributed to some confidential informant concerned a viewing by the party of surveillance photographs taken during the robbery, which purportedly resulted in an identification of Matthew Williams; a statement concerning previous sightings of a hat believed identical upon Matthew Williams' head; and a statement that the hat was currently located at 1603 East 17th Avenue.

What is striking here is that the confidential informant was "not even alleged to be reliable." *See Maddox v. State*, 133 Ga.App. 709, 213 S.E. 2d 1 (1975). Truly, however, the averment of previous reliability which appeared previously within the affidavit stands on no better footing than this complete failure to even bother to claim reliability and credibility on the part of the "confidential source."

The final paragraph alleges personal observation of an automatic handgun upon the premises. The basic infirmity previously discussed in relation to other averments within the affidavit is likewise evident in the evaluation of this final paragraph. Nowhere is there a sufficient averment concerning the credibility of the informant or the reli-

ability of the information conveyed, and the absence of such statements within the affidavit render it constitutionally invalid.

Nor is the affidavit saved by "independent corroboration." See *Spinelli v. United States*, *supra*. Corroborating facts revealed through independent surveillance "must be sufficient to raise the reliability to constitutional standards," *United States v. Evans*, 481 F.2d 990 (9th Cir. 1973), and such corroboration must do more than confirm minor details of the tip such as confirming the identity of the owner of certain premises or the outside appearance thereof. *United States v. Menser*, 360 F.2d 199 (2d Cir. 1966). Corroboration of minor aspects of the tip simply does not give rise to the "substantial basis" requirement of *Jones v. United States*, *supra*.

This was made clear in *Spinelli* by its discussion of *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L. Ed.2d 327 (1959), by way of comparison. As discussed in *Spinelli*, *Draper* involved information supplied by an informant which referred to facts which would not have been generally accessible to one lacking personal knowledge and credibility, providing details with "minute particularity" such that a magistrate could reasonably infer that both the informant and the information provided were reliable.

This was contrasted with the independent corroboration of only a single fact in *Spinelli*, which fact "could easily have been obtained" from sources not indicative of reliability such as remarks "heard at a neighborhood bar." The rationale for this rule is simple. When the matters corroborated by independent investigation are so particularized that it is apparent that information had not been fabricated "out of whole cloth," probable cause can lawfully be found. *Spinelli v. United States*, *supra*. But, as *Spinelli* amply illustrates, corroboration of only minor aspects of an

informant's tip is insufficient, especially where the information corroborated is of such a character that the mere possession thereof would not necessarily indicate personal knowledge or truthfulness.

Moreover, the character of the information corroborated must also be evaluated. Thus, where some details are corroborated, but the facts as independently established do not relate to the *essence* of the tip supplied, this provides no "substantial basis" for crediting the information as a whole. *United States v. Jordon*, 530 F.2d 722 (6th Cir. 1976). See also *United States v. Jones*, *supra*; *Spinelli v. United States*, *supra*. In the absence of corroboration of essential aspects of an informant's tip, an affidavit fails to set forth sufficient underlying circumstances to support the reasonable belief that informant or information are credible and reliable.

Here, the only statement of the "confidential source" which was corroborated by independent investigation was the fact that Matthew Williams resided with Carolyn Williams at 1603 East 17th Avenue. This was only "one small detail" of the information that had been provided the informant, see *Spinelli v. United States*, *supra*; this was corroboration of information which did not bear intrinsic indicia of reliability because of its inaccessible or particularized character; and further, this was corroboration which did not go to the "essence" of the tip.

Indeed, here the information corroborated, the identity of residents of particular premises, was information which could be easily obtained through reference to open public records such as a telephone directory. As such, the corroboration added even less weight to the affidavit than the minor details corroborated in *United States v. Menser*, *supra*.

Nor can it be said that here the information corroborated comprised the essence of the information provided,

that being the purported location of incriminatory evidence. Rather, here the information corroborated established at best merely that the confidential source knew where Matthew Williams resided, and with whom. And significantly, there was absolutely no corroboration by independent police investigation of a matter critical to the "confidential source's" reliability; that this person actually did not know Matthew Williams, or was acquainted with him, which simply cannot properly be inferred. *Martin v. Donnelly*, 391 F.Supp. 1241 (D. Mass. 1974).

The opinion issued by the Court of Appeals discussed none of the deficiencies alluded to herein, instead citing irrelevant externals such as the fact that the search warrant was sufficiently particularized as to the premises to be searched and the items sought. Wholly ignored, for example, was case law holding that mere allegations of previous reliability, such as appear in the affidavit, are wholly inadequate under the *Aguilar-Spinelli* requirements. See *Spinelli v. United States*, *supra*; *United States v. Harris*, *supra*. The Court of Appeals simply did not address the issues raised with regard to the search warrant affidavit.

The search warrant issued upon an affidavit which set forth largely uncorroborated hearsay statements attributed to one or more unnamed sources as to whose reliability no factual information was related. The search undertaken pursuant to the warrant issued indeed uncovered no evidence whatsoever that petitioner was involved in the bank robbery, but it did provide a coercive forum through which the petitioner's young stepchildren could be questioned as to their father's alleged involvement. The search warrant gave the investigating officers an excuse and apparent authority to invade the Williams' residence for several hours in seeking to implicate him in the robbery. The wholesale hearsay in the affidavit simply did not support the investigatory intrusion which resulted in the

purported identifications made. Since identification was the only issue at trial, there can be little question but that admission of the claimed identifications was not harmless error beyond a reasonable doubt, and the petitioners' conviction should be reversed so that he can be fairly tried.

CONCLUSION

This Petition for Certiorari presents issues of crucial importance in the areas of criminal law and criminal procedure. Investigating agents ran roughshod over the constitutional rights of the petitioner, Matthew Williams, Jr., in their efforts to implicate him in a robbery. Williams is now serving a twenty-five year sentence based wholly on eye-witness testimony of an unreliable nature. Obviously, he has a great personal interest in having his Petition granted. In addition, the issues raised herein are of critical contemporary concern, for the safeguards provided by this Honorable Court in its prior decisions concerning suspect identification procedures and the use of confidential informants and warrant affidavits are rapidly being diluted by lower courts.

Respectfully submitted,

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SETH H. Chief Judge

Matthew Williams, Jr. was convicted of robbing a branch of the Denver Midland Federal Savings and Loan

APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1229

UNITED STATES OF AMERICA,
Appellee,

v.

MATTHEW WILLIAMS, JR.,
*Appellant.*Appeal From
The
United States
District Court
For The
District
of Colorado
(D.C.
#77-CR-278)Scott H. Robinson, of Gerash & Springer, Denver,
Colorado, for Appellant.Donald M. Hoerl, Assistant United States Attorney
(Joseph F. Dolan, United States Attorney, with him on the
Brief) for Appellee.Before SETH, Chief Judge, McWILLIAMS and
DOYLE, Circuit Judges.

SETH, Chief Judge.

Matthew Williams, Jr. was convicted of robbing a
branch of the Denver Midland Federal Savings and LoanCompany in violation of 18 U.S.C. § 2113(d). He has
taken this appeal and raises four reasons for a reversal.

Defendant urges that testimony as to photo identifica-
tions by the defendant's stepchildren was the fruit of an
illegal search; that in-court identifications by two wit-
nesses were impermissible because of pretrial suggestive
confrontation; that rebuttal testimony by a Government
witness was collateral; and that several witnesses discussed
their testimony in violation of the trial court's sequestra-
tion instruction. Each issue was raised by motion before the
trial court and evidentiary hearings were held on each
motion except that concerning the rebuttal testimony.

We have reviewed the record, and must conclude that
the trial judge did not commit prejudicial error, nor abuse
his discretion.

At the time of the robbery, several customers, tellers,
and the branch manager were present. They described the
robber as a black, about 5'10", fairly young, slender, and
wearing a nylon stocking mask with a fishing type hat that
had a colored band around the brim. A surveillance cam-
era recorded the event. The developed photos showed a
man generally fitting the witnesses' descriptions. The fol-
lowing day FBI agents arrested three men in Las Vegas who
were in possession of some of the traveler's checks taken at
the robbery.

Matthew Williams became a suspect shortly thereafter
on an informant's tip. Also, the defendant appeared in sev-
eral surveillance photos taken at another bank wearing a
hat similar to the one worn by the robber. FBI agents ob-
tained a search warrant for the defendant's house to locate
bait money, the clothes worn by the robber, and a gun.
Two of the defendant's stepchildren were present at the
house during the search. The agents testified that the chil-
dren identified the defendant from the surveillance photos

taken during the robbery. Matthew Williams was arrested seven months later.

The Government's case thus rested solely on identifications as the Government did not offer any other evidence linking defendant to the crime. Four bank employees identified him as the robber. The defendant took the stand and denied robbing the branch.

Prior to trial, the defendant moved to suppress the testimony relating to the children's identification of the surveillance photos. This was denied, and the agents testified that the children identified defendant from the photos. The defendant here argues that the affidavit in support of the search warrant is insufficient under *Spinelli v. United States*, 393 U.S. 410, and *Aguilar v. Texas*, 378 U.S. 108; that the search was thus illegal, and urges that the testimony as to the stepchildren's identification was inadmissible under *Wong Sun v. United States*, 371 U.S. 471. Thus the admissibility of this testimony is argued on the issue of whether the search was valid, and thus on whether the affidavit supporting the warrant was sufficient. We will consider the matter in the same context since the parties have so presented it. The defendant states in his brief that the situation at the house was coercive of the children. The trial court found otherwise and we have no reason to disagree.

Probable cause for a search warrant is nothing more than a reasonable belief that the evidence sought is located at the place indicated by the law enforcement officer's affidavit. Affidavits, therefore, must be viewed with common sense and not subjected to hypertechnical scrutiny. *United States v. Ventresca*, 380 U.S. 102; *United States v. Haala*, 532 F.2d 1324 (10th Cir.); *United States v. Neal*, 500 F.2d 305 (10th Cir.). Accordingly, the affidavit must set forth facts and circumstances within the officer's knowledge supported by reasonably trustworthy information

from which a magistrate may reasonably conclude the items sought are connected to the crime and located at the place indicated. Confidential informants are obviously important sources of information in many instances, and their identity cannot be disclosed. Thus *Aguilar* requires an indication of the informant's reliability and the circumstances supporting the informant's tip. If this information is insufficient, then *Spinelli* permits the magistrate to consider other facts and circumstances which corroborate the informant's tip. In this way, "the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli*, at 416; *United States v. Sherman*, 576 F.2d 292 (10th Cir.); *United States v. McCoy*, 478 F.2d 176 (10th Cir.).

The affidavit in question is clearly sufficient under these standards. The search was to be at a particular place for items of clothing identified from the surveillance photo, a gun, and stolen traveler's checks, and bait money. The affidavit also explained the affiant's independent verification that Matthew Williams lived at the designated address. One, or possibly two, informants provided information linking the defendant to the items sought. An informant was personally acquainted with the defendant, knew where he lived, and allegedly saw an identical hat and handgun at the defendant's house. The affiant independently verified that the defendant lived at that address. Past reliability is alleged, and corroborating information supports the informant's tip. Probable cause was presented by the affidavit. The warrant was valid and the search was legal. The identification testimony was admissible.

The defendant maintains that two in-court identifications were inadmissible because of suggestive pretrial confrontation. This concerns the identification testimony by two bank employees who observed the defendant at the

pretrial suppression hearing. The pretrial hearing was concerned whether an in-court identification would be proper. The two employees were not asked to identify the defendant at this hearing. The trial court held a hearing on this issue, and after questioning these two witnesses, the trial judge determined their identifications to be admissible.

In *Manson v. Brathwaite*, 432 U.S. 98, the Supreme Court said:

" . . . [R]eliability is the linchpin in determining the admissibility of identification testimony. . . . The factors to be considered are set out in *Biggers*, 409 U.S., at 199-200. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself."

Manson, as well as *Neil v. Biggers*, 409 U.S. 188; *Simmons v. United States*, 390 U.S. 377, and *United States v. Wade*, 388 U.S. 218, stand for the proposition that a suggestive confrontation does not in and of itself require suppression. The totality of the circumstances must be considered to determine whether sufficient independent basis for the identification leads one to conclude that the identification is reliable. This is the method or standard used by the trial court. See *United States v. Herring*, 582 F.2d 535 (10th Cir.); *United States v. Milano*, 443 F.2d 1022 (10th Cir.).

The record shows that the trial judge extensively questioned these two witnesses at the suppression hearing. Judy Jamieson, a loan officer, was within five feet of the robber. Lighting conditions were excellent and she stated that his

facial features, although distorted by the nylon stocking, were distinguishable. She was the only witness who identified Matthew Williams from a photo array lineup which is not complained of here. She said that her recognition of the defendant at the pretrial hearing was based on what she saw during the robbery. Her close proximity to the robber, ability to describe physical characteristics, and previous photo identification provided ample basis for the trial court's finding.

Blanche Fall, the branch manager, saw the robber enter the bank and observed him throughout the robbery. He approached within fifteen feet of her desk. She did not pick anyone from the photo array lineup, but testified that height, weight, and posture were factors leading to her in-court identification of the defendant. Moreover, she testified that facial distortion was not so great as to prevent her from positively identifying the defendant. She was having a phone conversation when the robber entered and immediately told the other party to call the police. She activated the surveillance camera and watched the robber for the approximately two minutes he was in the bank. When he left through the front door, she ran out the back door in an attempt to watch his departure. She stressed her attentiveness and constant observation of the robber so that she could later identify him. The totality of the circumstances leads us to conclude that her identification was reliable and independent of the pretrial confrontation. The fact that she did not pick the defendant from the photo array lineup merely reflects on the weight of her testimony, not its admissibility. *United States v. Rizzo*, 418 F.2d 71 (7th Cir.), *cert. denied*, *Tornabene v. United States*, 397 U.S. 967.

The third issue raised by defendant involves rebuttal testimony by Beverly Campanella, a bank teller, which contradicted the defendant's denial during cross-examina-

tion that he had ever been inside the East Colfax branch. Inquiry into this alleged error is limited to determining whether the trial court abused its discretion. *United States v. Seely*, 570 F.2d 322 (10th Cir.). We find no reversible error as to this testimony. If it was inadmissible, it was harmless error.

The defendant lastly maintains he is entitled to a new trial because several witnesses discussed their testimony in violation of the trial court's sequestration instruction. Defendant filed his motion with affidavits from his wife and stepdaughter after the jury returned the verdict. The wife and the stepdaughter assert that they overheard the witnesses discuss their identification testimony in the hallway outside the court room during the trial. The trial court conducted an evidentiary hearing, and found that no violation had occurred, or, in any event, the brief colloquy heard by Wendy Oddo did not unduly affect the witnesses' testimony. The trial court noted the witnesses' demeanor, the wife's and the stepdaughter's position in a room adjacent to the hallway, and the conflict in their testimony. Substantial evidence in the record supports the findings. They are not clearly erroneous. Motions for a new trial are clearly within the trial court's discretion. *United States v. Maestas*, 523 F.2d 316 (10th Cir.). The record does not show any abuse because the transgression, assuming it was such, was not of a prejudicial nature as to warrant a new trial. *United States v. Johnston*, 578 F.2d 1352 (10th Cir.).

AFFIRMED.